

**\*E-FILED - 11/10/09\***

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES LUCIUS OLIVER,

Plaintiff,

v.

WARDEN C. NOLL, et al.,

Defendants.

No. C 09-3840 RMW (PR)

ORDER OF PARTIAL  
DISMISSAL; DISMISSAL  
WITH LEAVE TO AMEND  
OR NOTIFY COURT OF  
INTENT TO PROCEED WITH  
ORIGINAL COMPLAINT

Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff has been granted leave to proceed in forma pauperis in a separate order. For the reasons stated below, the court orders the complaint partially dismissed and grants plaintiff leave to amend. Alternatively, plaintiff shall file a notice that he intends to proceed only with the cognizable claims discussed below.

**DISCUSSION**

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss

any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1), (2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

#### B. Cognizable Claims

Plaintiff alleges that on December 26, 2005, he was denied his right to practice Al-Islam faith because defendants denied him access to the religious chapel and previously acquired Islamic study materials. (Complaint at 3C-3D.) Defendants Core, Perez, Tucker, and Noll prevented him from attending services. (Id.)

Plaintiff also alleges that on December 29, 2005, plaintiff believed defendant Gallegos tried to bait him into fighting by calling him names. (Id. at 3.) Plaintiff believes that Gallegos was trying to have plaintiff killed. (Id. at 3-3B.) Plaintiff was getting mad at the name-calling, but when plaintiff realized what was happening, he retreated and Gallegos began making disrespectful comments toward him. (Id. at 3B.)

Plaintiff further alleges that on October 17, 2006, defendants Core, Gallegos, Winlen, and another unknown lieutenant, all members of the Greenwall Gang, retaliated against petitioner for filing previously filing a complaint against Gallegos. (Id. at 3D.) Plaintiff states that these defendants conspired to allow another unnamed inmate to attack him by releasing plaintiff from segregation, knowing that other inmates had a plan to injure him. (Id. at 3D-3E.)

Plaintiff further alleges that on January 26, 2007, defendants Briseno and Meisner forced plaintiff to “perform homosexual bath house life styles” but plaintiff refused. (Id. at 3E-3F.) Plaintiff alleges that defendant Thomas gave the order to prohibit plaintiff from taking a shower in a one-man stall. (Id.)

1 Plaintiff further alleges that on June 26, 2007, defendant Campos threatened him with  
2 assault and death. (Id. at 3F.) As a result, plaintiff filed a 602 complaint. After plaintiff was  
3 interviewed by defendant McVay, unnamed staff told plaintiff to drop the complaint. (Id.)  
4 Defendant McClelland wanted other prisoners to injure plaintiff, and defendant Campos told  
5 plaintiff's cell mate that he would provide the weapon if plaintiff's cell mate agreed to assault  
6 plaintiff. (Id. at 3F-3G.) Defendant Thomas instructed other prisoners to stay out of the matter  
7 and plaintiff withdrew the complaint out of fear. (Id. at 3G.)

8 In addition, plaintiff claims that on October 18, 2007, defendant Campos put a hostile  
9 inmate into the same cell as plaintiff with the intention that the inmate would cause plaintiff  
10 harm. (Id.)

11 Plaintiff alleges that on October 21, 2007, defendant Core placed an "R" next to his name  
12 in his records, the highest level, in retaliation for plaintiff having filed a complaint against her  
13 and other Greenwall gang members. (Id. at 3H.) Plaintiff states that Core then gave harmful  
14 information to a prisoner "snitch" to spread around the facility in an attempt to put plaintiff in  
15 danger. (Id.) Defendant Navarro agreed with the placement of the "R" and then falsified an  
16 informal response. (Id.) Defendant Ramos contributed to the retaliation, and defendant Warden  
17 Neotti knowingly supported these acts. (Id.)

18 Plaintiff further claims that on January 10, 2008, defendant Lindsey employed defendant  
19 Mejia to threaten and assault plaintiff because he filed a grievance against her. (Id. at 3I.)

20 Plaintiff states that on January 28, 2008, he was harassed and disrespected by defendant  
21 Holcomb, who, with the permission of defendant Thomas, targeted and assaulted plaintiff. (Id.)  
22 Defendant Boles was used to "trash" plaintiff's cell and steal his possessions. (Id. at 3J.)  
23 Defendants Holcomb, Rios, McVay and Boccella took part in harassing and intimidating  
24 plaintiff. (Id.) Defendant Stepp and five other unnamed gang members joined in, all for the  
25 purpose of retaliating against plaintiff. (Id.)

26 Finally, plaintiff claims that on June 14, 2008, defendants Holcomb, Rios, and Thomas  
27 filed false charges against him so that he would be placed in a holding cell and miss a court-  
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1 imposed deadline for filing papers. (Id. at 3K.)

2       Liberally construed, plaintiff has stated cognizable claims of cruel and unusual  
3 punishment, deliberate indifference, retaliation, a violation of the Free Exercise Clause, and  
4 denial of access to courts.

5 C.     Dismissed Claims

6       1.     Property

7       Plaintiff alleges that on October 13 and October 25, 2006, after plaintiff was released  
8 from administrative segregation, plaintiff was instructed to report to the property room at B-  
9 facility. (Complaint at 3E.) When he picked up his box of property and looked through it, he  
10 discovered some of his property missing. (Id.)

11       Ordinarily, due process of law requires notice and an opportunity for some kind of  
12 hearing prior to the deprivation of a significant property interest. See Memphis Light, Gas &  
13 Water Div. v. Craft, 436 U.S. 1, 19 (1978). However, neither the negligent nor intentional  
14 deprivation of property states a due process claim under § 1983 if the deprivation was random  
15 and unauthorized. See Parratt v. Taylor, 451 U.S. 527, 535-44 (1981) (state employee  
16 negligently lost prisoner's hobby kit), overruled in part on other grounds, Daniels v. Williams,  
17 474 U.S. 327, 330-31 (1986); Hudson v. Palmer, 468 U.S. 517, 533 (1984) (intentional  
18 destruction of inmate's property). The availability of an adequate state post-deprivation remedy,  
19 e.g., a state tort action, precludes relief because it provides sufficient procedural due process.  
20 See Zinermon v. Burch, 494 U.S. 113, 128 (1990). California law provides such an adequate  
21 post-deprivation remedy. See Barnett v. Centoni, 31 F.3d 813, 816-17 (9th Cir. 1994).

22       Further, plaintiff has not identified a named defendant with respect to this claim.  
23 Plaintiff must establish legal liability of each person for the claimed violation of his rights.  
24 Liability may be imposed on an individual defendant under section 1983 if the plaintiff can show  
25 that the defendant proximately caused the deprivation of a federally protected right. See Leer v.  
26 Murphy, 844 F.2d 628, 634 (9th Cir. 1988). Sweeping conclusory allegations will not suffice;  
27 the plaintiff must instead "set forth specific facts as to each individual defendant's" deprivation  
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1 of protected rights. Id. Normally, the court would dismiss this claim with leave to amend,  
 2 however, based on plaintiff's proffer, "it appears beyond doubt that the plaintiff can prove no set  
 3 of facts in support of his claim which would entitle him to relief." Weilburg v. Shapiro, 488  
 4 F.3d 1202, 1205 (9th Cir. 2007). Accordingly, this claim is DISMISSED without leave to  
 5 amend.

## 6 2. Failure to investigate and file charges

7 Plaintiff alleges that Monterey County District Attorney Dean Flipppo and Inspector  
 8 General Jon Dodson refused to charge any of the defendants with his allegations. In addition,  
 9 plaintiff states that defendant Jordan told plaintiff someone would investigate his allegations, but  
 10 no one did. (Id. at 3C.) Plaintiff claims this violates his constitutional rights.

11 Whether to prosecute and what criminal charges to file or bring are decisions that rest in  
 12 the prosecutor's, not the court's, discretion. United States v. Batchelder, 442 U.S. 114, 124  
 13 (1979); Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a  
 14 judicially cognizable interest in the prosecution or nonprosecution of another.") Courts therefore  
 15 generally have declined to recognize standing to bring a § 1983 action based upon the lack of  
 16 prosecution of others. Based on plaintiff's proffer, "it appears beyond doubt that the plaintiff  
 17 can prove no set of facts in support of his claim which would entitle him to relief." Weilburg v.  
 18 Shapiro, 488 F.3d 1202, 1205 (9th Cir. 2007) (citations omitted). Accordingly, this claim will be  
 19 DISMISSED without leave to amend.

## 20 3. Medical claims

21 Plaintiff also describes several medical claims. Plaintiff alleges a violation of  
 22 constitutional rights occurring on April 11, 2006; August 30, 2007; September 25, 2007; January  
 23 9, 2008; and April 13, 2008. However, plaintiff's complaint fails to include the conduct of each  
 24 individual defendant that he asserts is responsible for a constitutional violation. Plaintiff shall  
 25 bear in mind that a complaint that fails to state the specific acts of the defendant which violated  
 26 the plaintiff's rights fails to meet the requirements of Rule 8(a)(2) of the Federal Rules of Civil  
 27 Procedure. Hutchinson v. United States, 677 F.2d 1322, 1328 n.5 (9th Cir. 1982).

District courts must afford pro se prisoner litigants an opportunity to amend to correct any deficiency in their complaints. Lopez v. Smith, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc). Here, plaintiff must specifically identify what each named defendant did or did not do in order to state a claim with regard to each claim. Plaintiff must establish legal liability of each person for the claimed violation of his rights. Liability may be imposed on an individual defendant under section 1983 if the plaintiff can show that the defendant proximately caused the deprivation of a federally protected right. See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988). Sweeping conclusory allegations will not suffice; the plaintiff must instead “set forth specific facts as to each individual defendant’s” deprivation of protected rights. Id. Accordingly, the court will DISMISS these claims with leave to amend to allege any medical claims, if he can do so in good faith.

Plaintiff will be given leave to amend the complaint to cure these deficiencies. Accordingly, the court grants plaintiff leave to file an amended complaint **within thirty (30) days** of the date this order is filed, to address the deficiencies set forth above. In the alternative, **within thirty (30) days** of the date this order is filed, plaintiff may file a notice with the court stating that he intends to proceed with the cognizable claims in the original complaint. Because an amended complaint completely replaces the original complaint, plaintiff must include in it all the claims he wishes to present. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992).

#### 4. Administrative appeals claims

Plaintiff alleges defendants Variz, Grounds, Thomas, Grannis, Jones and Medina failed to properly respond to and process plaintiff’s administrative appeals and complaints. Such allegations fail to state a claim for relief. There is no constitutional right to a prison administrative appeal or grievance system; consequently, a prison official’s failure to process grievances is not actionable under § 1983. See Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003). Further, while a prisoner retains a First Amendment right to petition the government for redress of grievances as to the constitutional claim underlying an administrative grievance, he possesses no constitutional right to a response to his grievance from prison officials. See Flick v.

1 Alba, 932 F.2d 728, 729 (8th Cir. 1991) (holding prisoner's First Amendment right of access to  
2 courts is not compromised by prison's refusal to entertain grievance). Although the court  
3 generally grants leave to amend, here plaintiff has no cognizable due process claim for failure to  
4 follow proper regulations and policies in processing his administrative appeal. Nor has plaintiff  
5 alleged a cognizable claim of denial of access to the courts, because he has been able to pursue  
6 his legal claims by filing the instant complaint. Accordingly, plaintiff's claim that his grievances  
7 or complaints were not processed or responded to will be DISMISSED without leave to amend.

8 D. Dismissed Named Defendants

9 Defendants Jordan, Reamer, Fleicher, Grounds, Burgh, Makela, Ramirez, CCII Ramos,  
10 Grannis, Flipppo, Craft, Stryker, Gate, and Dodson are DISMISSED from this action. Plaintiff  
11 fails to assert any allegations against them other than listing their names in the "defendants"  
12 section of his complaint. Absent any cognizable claims of wrongdoing, defendants Flipppo,  
13 Dodson, Grounds, Grannis, Medina are DISMISSED from this action for the reasons stated in  
14 Sections C2 and C4, infra. If plaintiff can in good faith allege facts to cure the pleading  
15 deficiency he may add this information to his amended complaint.

16 E. Dismissed Doe Defendants

17 Plaintiff names several "unidentified" defendants in his complaint. The use of "Doe"  
18 defendants is not favored in the Ninth Circuit. See Gillespie v. Civiletti, 629 F.2d 637, 642 (9th  
19 Cir. 1980). However, where the identity of alleged defendants cannot be known prior to the  
20 filing of a complaint the plaintiff should be given an opportunity through discovery to identify  
21 them. Id. Failure to afford the plaintiff such an opportunity is error. See Wakefield v.  
22 Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999).

23 Accordingly, Doe defendants are DISMISSED from this action without prejudice.  
24 Should plaintiff learn the identity of any Doe defendants through discovery, he may move to file  
25 an amendment to the complaint to add the individuals as named defendants. See Brass v.  
26 County of Los Angeles, 328 F.3d 1192, 1195-98 (9th Cir. 2003).

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## CONCLUSION

For the foregoing reasons, the court hereby orders as follows:

1. Plaintiff's claims regarding destroyed property, failure to investigate and file charges, and administrative appeals are DISMISSED without leave to amend for failure to state a claim.

2. Plaintiff's medical claims are DISMISSED with leave to amend.

3. Defendants Jordan, Reamer, Fleicher, Grounds, Burgh, Makela, Ramirez, CCII Ramos, Grannis, Flipppo, Craft, Stryker, Gate, and Dodson are DISMISSED without prejudice. "Doe" defendants are DISMISSED without prejudice.

4. Plaintiff shall file an amended complaint **within thirty (30) days** from the date this order is filed. **In the alternative, within thirty (30) days** from the date this order is filed, plaintiff may file a notice with the court stating that he intends to proceed with the cognizable claims in the original complaint.

An amended complaint must include the caption and civil case number used in this order (C 09-3840 RMW (PR)) and the words "AMENDED COMPLAINT" on the first page. Because an amended complaint completely replaces the original complaint, plaintiff must include in it all the claims he wishes to present. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). Plaintiff may not incorporate material from the original complaint, such as supporting documentation or exhibits, by reference. Plaintiff must include all of his claims, including the cognizable claims set forth above, in the amended complaint. **Failure to file an amended complaint or file a notice with the court in compliance with this order within the designated time will result in the court proceeding with the cognizable claims in the original complaint as stated in this order.**

5. Plaintiff is advised that an amended complaint supersedes the original complaint. "[A] plaintiff waives all causes of action alleged in the original complaint which are not alleged in the amended complaint." London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981). Defendants not named in an amended complaint are no longer defendants. See Ferdik v.



1 Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992).

2 6. It is the plaintiff's responsibility to prosecute this case. Plaintiff's must keep the  
3 court informed of any change of address by filing a separate paper with the clerk headed "Notice  
4 of Change of Address," and must comply with the court's orders in a timely fashion. Failure to  
5 do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule  
6 of Civil Procedure 41(b).

7 IT IS SO ORDERED.

8 DATED: 11/6/09 \_\_\_\_\_

  
RONALD M. WHYTE  
United States District Judge